COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3112-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DORAN J. LONDON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Doran J. London appeals from an order of the circuit court denying his motion for sentence modification. However, for the reasons discussed below, we conclude that the circuit court's order must be affirmed.

BACKGROUND

On May 17, 1993, London entered a plea of no contest to one charge of delivery of a controlled substance (cocaine) in violation of former §§161.41(1)(c)1 and 161.16(2)(b)1, STATS.[1] He also entered a plea of no contest to one charge of possession of a controlled substance (heroin) in violation of former §§ 161.41(2r)(a) and 161.14(3)(k), STATS.[2] London was charged as a repeat offender pursuant to former §§ 161.48(3) and 161.41(2r)(a) and (c), STATS.[3] After a sentencing hearing, the circuit court sentenced London to ten years in prison on the delivery charge and three years probation on the possession charge, to run consecutively. On July 19, 1993, both London and his trial counsel signed a "Rights to Appeal" form stating that London did not intend to seek postconviction relief.

Three years passed. On September 30, 1996, London moved for the modification of his sentence based on alleged "new factors." The circuit court denied his motion and this appeal followed.

---

[1] Former § 161.41(1)(c)1, STATS., is now § 961.41(1)(cm)1, STATS. 1995 Wis. Act 448, § 244. Former § 161.16(2)(b)1, STATS., is now § 961.16(2)(b)1, STATS. 1995 Wis. Act 448, § 173.

[2] Former § 161.41(2r)(a), STATS., is now § 961.41(3g), STATS. 1995 Wis. Act 448, § 255. Former § 161.14(3)(k), STATS., is now § 961.14(3)(k), STATS. 1995 Wis. Act 448, § 161.

[3] Former § 161.48(3), STATS., is now § 961.48(3), STATS. 1995 Wis. Act 448, § 288. Former § 161.41(2r)(c), STATS., is now § 961.41(3g)(a)3, STATS. 1995 Wis. Act 448, § 257. The subsequent history of former section 161.41(2r)(a) appears above in note 2.

DISCUSSION

Standard of Review.

Whether a fact or a set of facts satisfies the standard for sentence modification is a question of law; therefore, on review we need not defer to the circuit court's determination. ***State v. Krueger***, 119 Wis.2d 327, 332, 351 N.W.2d 738, 741 (Ct. App. 1984).

Appeal from Judgment.

Appearing *pro se*, London purports to appeal from the 1993 judgment of conviction. We observe, first, that by entering the pleas of no contest, London waived all nonjurisdictional defects and defenses. ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986). Additionally, the time within which to pursue postconviction relief has long since expired. RULE 809.30(2)(b), STATS., *see* ***State v. Tobey***, 200 Wis.2d 781, 784, 548 N.W.2d 95, 96 (Ct. App. 1996).[4] Therefore, the judgment of conviction is not properly before us.

Sentence Modification.

Though inartfully drafted, London's notice of appeal can be construed as a challenge to the circuit court's denial of his September 1996 motion for sentence modification. Because London is a *pro se* litigant, we read the notice of appeal in the light most favorable to him and proceed with review of the order denying that motion.

[4] RULE 809.30(2)(b), STATS., provides, in pertinent part: "Within 20 days of the date of sentencing, the defendant shall file in the trial court and serve on the district attorney a notice of intent to pursue postconviction relief."

A motion for sentence modification based on "new factors" can be made at any time and need not be preserved using the procedure of RULE 809.30, STATS. ***Krueger***, 119 Wis.2d at 332, 351 N.W.2d at 741. The term "new factor" has been defined as,

> [A] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Id. at 333, 351 N.W.2d at 741-42 (citation omitted).

London sets forth four alleged new factors in support of his motion for sentence modification. First, London argues that the circuit court did not understand the extent to which he cooperated with the State and that, had the court considered this factor, his sentence would necessarily have been more lenient. We cannot agree. London appears to suggest that he had been promised lenient treatment in exchange for cooperation. The record before us, however, contains no evidence of any agreement between London and the State. We cannot determine that London had any reasonable expectation of lenient treatment, and thus we reject this "new factor" argument.[5]

London also contends that alleged inaccuracies in his presentence report constitute a new factor warranting sentence modification. We are unable to review this issue, as the presentence report is not in the record. It is the duty of the appellant to see that relevant evidence is included in the record. ***State v. Michels***, 141 Wis.2d 81, 90 n.3, 414 N.W.2d 311, 314 n.3 (Ct. App. 1987).

[5] Review of the sentencing transcript reveals, in any event, that the court did consider London's cooperation in making the sentencing determination.

Next, London suggests that the circuit court failed to appreciate his status as a drug addict and improperly applied former § 161.001(2), STATS.[6] It is clear from the sentencing transcript that the court was well aware of London's addiction and his long history of substance abuse. We do not find this to be a new factor.

Finally, London argues that the State failed to meet its burden of proof regarding his prior convictions and sentenced him as a repeat offender. We agree with London that the provisions of § 973.12, STATS., apply to the enhanced penalty provisions of former § 161.48, STATS.[7] ***State v. Coolidge***, 173 Wis.2d 783, 793, 496 N.W.2d 701, 706-07 (Ct. App. 1993). As ***Coolidge*** confirms, however, this is not a new factors issue, but rather an allegation of illegality governed by § 974.06, STATS. ***Id.*** at 788, 496 N.W.2d at 704-05. Because no such motion has been made, we decline to review this argument.[8]

London advances several additional arguments, relating to the validity of his plea and the violation of an alleged plea agreement by the State. Again, these are matters for review by the sentencing court pursuant to § 974.06, STATS. As they are not properly before this court, we decline to review them.[9]

---

[6] Former section 161.001(2), STATS., is now § 961.001(2), STATS. 1995 Wis. Act 448, § 109. The statute provides, in pertinent part, "persons addicted to or dependent on controlled substances should, upon conviction, be sentenced in a manner most likely to produce rehabilitation."

[7] Section 973.12, STATS., requires that, for purposes of penalty enhancement, prior convictions must either be admitted by the defendant or proved by the State.

[8] We note, in any event, that the incomplete record before us would prevent such review.

[9] We do not decide whether London's arguments meet the threshold for review under § 974.06, STATS. *See* ***State v. Nicholson***, 148 Wis.2d 353, 360, 435 N.W.2d 298, 301 (Ct. App. 1988).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.